

SENATE BILL NO. 435

INTRODUCED BY V. JACKSON

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A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT POWER GENERATION WATER RIGHTS ARE JUNIOR IN PRIORITY TO ALL WATER RIGHTS UPSTREAM FROM A HYDROELECTRIC FACILITY; PROVIDING THAT THERE IS NO LIMIT ON THE AMOUNT OF WATER THAT A HYDROELECTRIC FACILITY MAY HOLD IN STORAGE BEHIND A DAM THROUGH WHICH WATER FLOWS TO CREATE ELECTRICITY; REQUIRING THE WATER COURT TO MAKE NECESSARY AMENDMENTS TO DECREED WATER RIGHTS; AMENDING SECTION 85-2-237, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**NEW SECTION. Section 1. Power generation rights junior to other water rights -- unlimited storage.** (1) Subject to subsection (2), power generation water rights are junior in priority to all water rights, except other power generation water rights, upstream from a hydroelectric facility.

(2) Power generation water rights that are held by entities licensed through the federal energy regulatory commission or that are appurtenant to structures that are licensed through the federal energy regulatory commission may not be reduced in flow or volume to an extent that the owner would not be able to meet the regulatory requirements in the license issued to the owner by the federal energy regulatory commission.

(3) A hydroelectric water right places no limit on the volume or use of water that a hydroelectric facility may hold in storage behind a dam through which water flows to create electricity. However, the hydroelectric facility shall comply with water right calls placed by downstream senior water rights and other laws, including but not limited to maximum storage and dam safety requirements.

**NEW SECTION. Section 2. Definition.** As used in 85-2-237 and [sections 1 and 2], "water right" means the right to use water as documented by a claim to an existing right, a permit, or a certificate of water right.

**Section 3.** Section 85-2-237, MCA, is amended to read:

**"85-2-237. (Temporary) Reopening and review of decrees.** (1) After July 1, 1996, the water judges shall by order reopen and review, within the limits set forth by the procedures described in this section, all



1 preliminary or final decrees:

2 (a) that have been issued but have not been noticed throughout the water divisions;

3 (b) for basins for which claims have been filed under 85-2-221(3); ~~or~~

4 (c) for basins that were verified and not examined for which the water court has received a petition and  
5 has determined that examination is necessary, as provided in 85-2-282, or the water court has issued an order  
6 for reexamination on its own initiative; or

7 (d) for basins that contain power generation water rights.

8 (2) (a) Each order must state that the water judge will reopen the decree or decrees and, upon a hearing,  
9 review the water court's determination of any claim in the decree or decrees if:

10 (i) an objection to the claim has been filed for the purpose of protecting rights to the use of water from  
11 sources:

12 (i)(A) within the basin for which the decree was entered; or

13 (i)(B) in other basins that are hydrologically connected to sources within the basin for which the decree  
14 was entered; or

15 (ii) a claim was filed in that basin for the purpose of power generation.

16 (b) A person may not raise an objection to a matter in a reopened decree if the person was a party to  
17 the matter when the matter was previously litigated and resolved as the result of the previous objection process,  
18 unless the objection is allowed for any of the following reasons:

19 (i) mistake, inadvertence, surprise, or excusable neglect;

20 (ii) newly discovered evidence that by due diligence could not have been discovered in time to move for  
21 a new trial under Rule 59(b), Montana Rules of Civil Procedure;

22 (iii) fraud, misrepresentation, or other misconduct of an adverse party;

23 (iv) the judgment is void;

24 (v) any other reason justifying relief from the operation of the judgment.

25 (c) The objection must be made in accordance with the procedure for filing objections under 85-2-233.

26 (3) The water judges shall serve notice by mail of the entry of the order providing for the reopening and  
27 review of a decree or decrees to the department and to the persons entitled to receive service of notice under  
28 85-2-232(1).

29 (4) Notice of the reopening and review of a preliminary or final decree must also be published at least  
30 once each week for 3 consecutive weeks in at least three newspapers of general circulation that cover the water

1 division or divisions in which the decreed basin is located.

2 (5) An objection may not cause a reopening and review of a claim unless the objection is filed with the  
3 appropriate water court within 180 days after the issuance of the order under subsection (1). This period of time  
4 may, for good cause shown, be extended by the water judge for up to two 90-day periods if an application for  
5 extension is made within the original 180-day period or any extension of it.

6 (6) The water judge shall provide notice to the claimant of any timely objection to the claim and, after  
7 further reasonable notice to the claimant, the objector or objectors, and other interested persons, set the matter  
8 for hearing. The water judge may conduct individual or consolidated hearings, and any hearing must be  
9 conducted according to the Montana Rules of Civil Procedure. On an order of the water judge, a hearing may be  
10 conducted by a water master, who shall prepare a report of the hearing as provided in Rule 53(e), Montana Rules  
11 of Civil Procedure.

12 (7) The water judge shall, on the basis of any hearing held on the matter, take action as warranted from  
13 the evidence, including:

14 (a) dismissal of the objection or modification of the portion of the decree describing the contested claim;  
15 or

16 (b) (i) changing the priority date of any power generation water rights to be junior to all water rights that  
17 exist upstream from a hydroelectric facility; and

18 (ii) modifying the decree to reflect this change in priority date.

19 (8) An order or decree modifying a previously issued final decree as a result of procedures described  
20 in this section may be appealed in the same manner as provided for an appeal taken from a final order of a district  
21 court.

22 (9) An order or decree modifying a previously issued preliminary decree as a result of procedures  
23 described in this section may be appealed under 85-2-235 when the preliminary decree has been made a final  
24 decree.

25 (10) An order requiring the department to examine a basin that was initially verified is limited to the types  
26 of claims in the basin that were identified in the petition, as provided in 85-2-282, or the types of claims identified  
27 in an order that the water court issued on its own initiative. (Terminates June 30, 2020--sec. 18, Ch. 288, L.  
28 2005.)

29 **85-2-237. (Effective July 1, 2020) Reopening and review of decrees.** (1) After July 1, 1996, the water  
30 judges shall by order reopen and review, within the limits set forth by the procedures described in this section,

1 all preliminary or final decrees:

2 (a) that have been issued but have not been noticed throughout the water divisions; ~~or~~

3 (b) for basins for which claims have been filed under 85-2-221(3); or

4 (c) for basins that contain power generation water rights.

5 (2) (a) Each order must state that the water judge will reopen the decree or decrees and, upon a hearing,  
6 review the water court's determination of any claim in the decree or decrees if:

7 (i) an objection to the claim has been filed for the purpose of protecting rights to the use of water from  
8 sources:

9 ~~(i)(A)~~ (A) within the basin for which the decree was entered; or

10 ~~(i)(B)~~ (B) in other basins that are hydrologically connected to sources within the basin for which the decree  
11 was entered; or

12 (ii) a claim was filed in that basin for the purpose of power generation.

13 (b) A person may not raise an objection to a matter in a reopened decree if the person was a party to  
14 the matter when the matter was previously litigated and resolved as the result of the previous objection process,  
15 unless the objection is allowed for any of the following reasons:

16 (i) mistake, inadvertence, surprise, or excusable neglect;

17 (ii) newly discovered evidence that by due diligence could not have been discovered in time to move for  
18 a new trial under Rule 59(b), Montana Rules of Civil Procedure;

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24 review of a decree or decrees to the department and to the persons entitled to receive service of notice under  
25 85-2-232(1).

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29 (5) No objection may cause a reopening and review of a claim unless the objection is filed with the  
30 appropriate water court within 180 days after the issuance of the order under subsection (1). This period of time

1 may, for good cause shown, be extended by the water judge for up to two 90-day periods if an application for  
2 extension is made within the original 180-day period or any extension of it.

3 (6) The water judge shall provide notice to the claimant of any timely objection to the claim and, after  
4 further reasonable notice to the claimant, the objector or objectors, and other interested persons, set the matter  
5 for hearing. The water judge may conduct individual or consolidated hearings, and any hearing must be  
6 conducted according to the Montana Rules of Civil Procedure. On an order of the water judge, a hearing may be  
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13 (b) (i) changing the priority date of any power generation water rights to be junior to all water rights that  
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16 (8) An order or decree modifying a previously issued final decree as a result of procedures described  
17 in this section may be appealed in the same manner as provided for an appeal taken from a final order of a district  
18 court.

19 (9) An order or decree modifying a previously issued preliminary decree as a result of procedures  
20 described in this section may be appealed under 85-2-235 when the preliminary decree has been made a final  
21 decree."

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23 **NEW SECTION. Section 4. Codification instruction.** [Sections 1 and 2] are intended to be codified  
24 as an integral part of Title 85, chapter 2, part 2, and the provisions of Title 85, chapter 2, part 2, apply to [sections  
25 1 and 2].

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27 **NEW SECTION. Section 5. Effective date.** [This act] is effective on passage and approval.

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